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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1328 ~~Misc.~~

WOODROW WILSON LASHLEY, SR.
AND
CLAIRE ANITA RYZA,
Appellants,

v.

STATE OF MARYLAND,
Appellee.

MOTION TO DISMISS APPEAL FROM THE COURT OF APPEALS OF MARYLAND

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Appellee moves to dismiss the appeal from the Order of the Court of Appeals of Maryland dated November 10, 1970 (App. B. to Appellants' Jurisdictional Statement), which Order denied Appellants' Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland. The grounds for the Motion are: (1) that the decision appealed from was not in favor of the validity of a State statute questioned as being repugnant to the Constitution of the United States, and (2) Appellants have no standing

in this Court to assert that the State statute is unconstitutional. In addition, if this Honorable Court determines that Appellants have standing to prosecute this appeal, the statute in question is not unconstitutional.

OPINION BELOW

The Opinion of the Court of Special Appeals of Maryland is reported at 10 Md. App. 136, 268 A. 2d 502 (1970). It is also reprinted in the Appendix to Appellants' Jurisdictional Statement, App. A., p. 1a. The Order of the Court of Appeals of Maryland denying Appellants' Petition for Writ of Certiorari was entered without Opinion and is reprinted in the Appendix to Appellants' Jurisdictional Statement as App. B., p. 9a.

JURISDICTION

Appellee submits that this Honorable Court does not have jurisdiction over this case under 28 U.S.C.A., Section 1257(2) as asserted by Appellants.

STATUTORY PROVISIONS INVOLVED

Appellants assert that Article 27, Section 3, Maryland Code Annotated (1967 Repl. Vol.) is involved. The statute is reprinted in its entirety at pages 2-3 of Appellants' Jurisdictional Statement. This statute was repealed by Chapter 470, Section 1 of the Laws of Maryland, 1968 and replaced by the Therapeutic Abortion law, presently contained in Article 43, Sections 137-139, Maryland Code Annotated (1971 Repl. Vol.).

QUESTIONS PRESENTED

1. Whether or not Appellants may invoke the provisions of 28 U.S.C.A., Section 1257(2) to appeal directly to this Honorable Court.

2. Whether or not Appellants have standing to assert the unconstitutionality of Article 27, Section 3, Maryland Code Annotated (1967 Repl. Vol.).

3. If questions 1 and 2 are answered in the affirmative, was Article 27, Section 3, Maryland Code Annotated (1967 Repl. Vol.) unconstitutional (prior to its repeal) as a violation of the First, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF FACTS

Appellants were convicted in the Circuit Court for Wicomico County, Maryland, by the trial court sitting without a jury, on two counts charging the commission of two abortions, three counts charging conspiracy to commit abortion and practicing medicine without a license. Appellants were sentenced to concurrent terms of two years imprisonment on each of the counts charging abortion and conspiracy to commit abortion and each was fined $50.00 on the conviction for practicing medicine without a license.

At a preliminary hearing, the trial court heard considerable evidence concerning the facts contained in the affidavits of three members of the Maryland State Police who obtained a search and seizure warrant for the premises known as 6114 Lawyers Hill Road in Elkridge, Howard County, Maryland, which led the affiants to conclude that the abortion laws were being violated on those premises. After finding that the search warrant had been validly issued and the evidence obtained in execution thereof was admissible, the trial proceeded on an Agreed Statement of Facts. These facts were briefly, that on November 17, 1967, the police, armed with the warrant, entered the premises at 6114 Lawyers Hill Road arresting the Appellants who were occupying the premises under false names.

The police seized tangible evidence showing that abortions were being performed on the premises, which evidence further indicated that Appellants had performed two abortions that day. Three pregnant girls were present on the premises and admitted that they were there to have abortions performed upon them by the Appellants. The two girls who had abortions performed on them admitted that the Appellants had performed the abortions, were taken to the hospital and examined. After the examining physicians found them to have had recent abortions, the girls remained for treatment. It was admitted under this Agreed Statement of Facts that neither Appellant was licensed to practice medicine.

In their appeal to the Court of Special Appeals of Maryland, Appellants raised two issues: (a) That the search warrant, under which the incriminating evidence was seized, had been issued without probable cause, and (b) that the statute under which the counts charging abortion and conspiracy to commit abortion had been brought was unconstitutional. After thoroughly reviewing the facts contained in the affidavits leading to the issuance of the search warrants, the Court of Special Appeals of Maryland concluded that the warrant had been validly obtained and the evidence seized thereunder properly admitted at the trial. In contending that the applicable statute, Article 27, Section 3, Maryland Code Annotated (1967 Repl. Vol.) was unconstitutional, Appellants contended in the Court of Special Appeals of Maryland that (1) the statute was vague and uncertain in its application to them as non-physicians, (2) that the statutory provisions permitting therapeutic abortions by licensed physicians similarly was unconstitutional because it failed to give fair and definite notice of the prohibited acts, and (3) that the statute was unconstitutional as an interference with the right of a

woman to avoid childbirth for any reason she might desire. In its opinion the Court of Special Appeals of Maryland disposed of the first contention finding that the statute gave Appellants fair notice that they were prohibited from performing abortions under any circumstances as non-physicians and that such a criminal statute was within the constitutional police power of the State. On the second contentions in which Appellants asserted the unconstitutionality of the statute as it affected licensed physicians and as it affected the woman's right to avoid childbirth, the Court held that Appellants had no standing to assert the constitutional rights possessed by others, and therefore, did not reach the constitutional questions presented in this appeal by the Appellants.

ARGUMENT

I.

APPELLANTS MAY NOT INVOKE THE PROVISIONS OF 28 U.S.C.A., SECTION 1257 (2) TO APPEAL DIRECTLY TO THIS HONORABLE COURT.

The Supreme Court of the United States has jurisdiction to review final judgments or decrees rendered by the highest court of a state on direct appeal, "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." 28 U.S.C.A., Section 1257 (2). It is the position of the Appellee herein that Appellants did not possess standing, either in the court below or in this Honorable Court, to question the validity of a state statute on the grounds assigned and that therefore, the highest court of the State of Maryland did not have occasion to decide the question of the constitutionality of a statute of the State of Maryland.

While the opinion of the Court of Special Appeals of Maryland indicates that the Appellants raised the contention there that Article 27, Section 3, Maryland Code Annotated (1967 Repl. Vol.) was unconstitutional because it was vague and uncertain in its application, it is submitted that the issue of unconstitutionality was raised only in connection with Appellant's contention that the statute was unconstitutional as applied to medical doctors and as it affected the pregnant woman's right to avoid childbirth. The question of application of the statute to Appellants themselves, who were not qualified physicians, was raised as a question of the sufficiency of the indictment to charge an offense. On this question the Court of Special Appeals found that the indictment under which Appellants were convicted had provided fair notice to them, as non-physicians, of the prohibition against non-physicians performing abortions under any circumstances.

The Court of Special Appeals of Maryland held that Appellants had no standing to raise or attempt to vindicate the constitutional rights of others (in this case, medical doctors and pregnant women) as they were affected by the provisions of the then Maryland Abortion law. Appellants' Jurisdictional Statement in this Honorable Court raises only the question of Appellants' right or standing to attack the constitutionality of the then Maryland Abortion statute as vague and indefinite as applied to license medical practitioners and as an infringement upon the right of a pregnant woman to choose whether she will bear a child or have an abortion. The substantive question of standing will be discussed in the succeeding argument; but as it affects the question of jurisdiction to consider the issue on direct appeal, it is respectfully submitted that the highest court of the State of Maryland did not have the opportunity to determine the validity of the State

statute on constitutional grounds, finding that the Appellants had no standing to raise this issue, and that therefore this question may not be presented to this Honorable Court on direct appeal.

II.

APPELLANTS HAVE NO STANDING TO ASSERT THE UNCONSTITUTIONALITY OF ARTICLE 27, SECTION 3 MARYLAND CODE ANNOTATED (1967 REPL. VOL.).

Appellee submits that the Court of Special Appeals of Maryland properly concluded that Appellants, neither of whom are either physicians or women seeking to assert their right to an abortion, had no standing to assert that the statute had adversely affected their constitutional rights. Having admitted that the State may, under its police power, outlaw the commission of abortions by those who are not qualified physicians, the lower court properly concluded that Appellants had not shown any way in which the State's statute had inflicted an unconstitutional injury upon any lawfully protected interest they possessed, *i.e.*, they possessed neither the right of a medical doctor to perform a therapeutic abortion nor the right of a pregnant woman to obtain an abortion.

As pointed out in *Flast v. Cohen*, 392 U.S. 83, 20 L. Ed. 2d 947, 88 S. Ct. 1942 (1968) "when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." And in *Jenkins v. McKeithen*, 395 U.S. 411, 23 L. Ed. 2d 404, 89 S. Ct. 1843 (1969), it was stated:

> "The concept of standing to sue, as we noted in *Flast v. Cohen, supra*, 'is surrounded by the same complexities and vagaries that inhere in [the concept of] justiciability' in general. 392 U.S. at 98, 20 L. Ed. 2d at 960. Nevertheless, the outlines of the concept can be

> stated with some certainty. The indispensable requirement is, of course, that the party seeking relief allege 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions . . . .' *Baker v. Carr,* 369 U.S. 186, 204, 7 L. Ed. 2d 663, 677, 82 S. Ct. 691 (1962); see *Flast v. Cohen, supra; Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 151, 95 L. Ed. 817, 842, 71 S. Ct. 624 (1951) (concurring opinion). In this sense, the concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought. See *Flast v. Cohen, supra,* at 99-100, 20 L. Ed. 2d at 961. The decisions of this Court have also made it clear that something more than an 'adversary interest' is necessary to confer standing. There must in addition be some connection between the official action challenged and some legally protected interest of the party challenging that action. See *Flast v. Cohen, supra,* at 101-106, 20 L. Ed. 2d at 962-965."

It may thus be observed that the important element in this question of standing is that the party challenging the State statute possesses some "legally protected interest" which he contends has been unconstitutionally denied him.

The case of *Griswold v. Connecticut,* 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965) may be readily distinguished in that appellants in that case were charged and convicted with aiding and abetting married persons with whom they had a professional relationship in the use of a drug, medicinal article or instrument for the purpose of preventing conception. Appellants in *Griswold* were an officer of the Planned Parenthood League of Connecticut and a licensed physician employed by the League to give information, instruction and medical advice to married persons as to means of preventing conception. There, this Court

clearly held that the appellants, operating within a professional and confidential relationship with their patients possessed a legally protected interest affected by the sweep of the state's statute.

Appellants herein, as pointed out by the Court of Special Appeals of Maryland, have no such legally or constitutionally protected interests and do not stand in any such confidential or professional relationship to their "patient", sufficient to invest them with standing to assert either the licensed physician's right to perform a therapeutic abortion or the pregnant woman's right to terminate her pregnancy. In addition, it is clear that Appellants here cannot assert that their rights in any way have come within the penumbra of those basic and fundamental rights guaranteed in the Bill of Rights to the Constitution of the United States, which was so forcefully enunciated in *Griswold v. Connecticut, supra.*

III.

ARTICLE 27, SECTION 3, MARYLAND CODE ANNOTATED (1967 REPL. VOL.) WAS NOT UNCONSTITUTIONAL AS A VIOLATION OF THE FIRST, FOURTH, NINTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES (AS APPLIED PRIOR TO REPEAL).

Assuming, *arguendo,* that Appellants possess the standing to attack the constitutionality of the State statute and that such action may be taken on direct appeal to this Honorable Court, the substantive issue presented has been fully answered by the recent action of this Court in upholding the constitutionality of the District of Columbia Abortion law in *United States v. Vuitch,* No. 84, October Term, 1970 (opinion delivered April 21, 1971), (reversing *United States v. Vuitch,* 305 F. Supp. 1032 (D.C. D.C. 1969)).

Appellants contended in their Jurisdictional Statement that the issues presented in *United States v. Vuitch, supra,*

and in *Babbitz v. McCann,* No. 297, October Term, 1970 are identical with the issues on the merits presented in the instant case (Jurisdictional Statement, p. 19). This Honorable Court vacated and remanded *Babbitz v. McCann, supra,* on April 19, 1971, in light of *Younger v. Harris,* 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. ..... (1971) and *Samuels and Fernandes v. Mackell,* 401 U.S. 66, 27 L. Ed. 2d 688, 91 S. Ct. ..... (1971). 39 L.W. 3455.

Appellee joins Appellants in asserting that the holding in *United States v. Vuitch, supra,* is directly applicable to dispose of the issues presented in this case. The District of Columbia Abortion law made it a felony for anyone other than a competent licensed practitioner of medicine to perform an abortion and provided that such a licensed physician could perform an abortion only if the same was done "as necessary for the preservation of the mother's life or health". 22 D.C. Code 201. The Maryland statute in question here, similarly made it a felony for anyone other than a regular practitioner of medicine to perform or cause an abortion to be performed and permitted a regular practitioner of medicine to supervise a natural or spontaneous abortion or to perform an abortion only after consultation with one or more other physicians to satisfy himself that the foetus is dead or "that no other method will secure the safety of the mother". Article 27, Section 3, Maryland Code Annotated (1967 Repl. Vol.). The statutes are substantially similar enough to be considered together.

This Honorable Court in *United States v. Vuitch, supra,* concluded that the District of Columbia Abortion law did not place upon the physician the burden to prove his innocence but rather placed upon the prosecution the burden to plead and prove that the abortion was not necessary for the preservation of the mother's life or health and further

found that the use of the term "health" was not constitutionally offensive under the Due Process clause as a vague or indefinite definition. A similar result must follow in this case if this Honorable Court considers the constitutional merits of the former Maryland Abortion law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Appellants' appeal from the Court of Appeals of Maryland should be dismissed.

Respectfully submitted,

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